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MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANT: James R. Melin

OBJECTOR: Trout Unlimited

CASE 43B-0148-R-2020

43B 194537-00

43B 194539-00

43B 194540-00

43B 194541-00

43B 194542-00

43B 194543-00

ORDER ON SECOND MOTION FOR SUMMARY JUDGMENT

Objector Trout Unlimited (“TU”) filed a motion for summary judgment seeking an order dismissing water right claim 43B 194537-00 or alternatively to limit its periods of use and diversion to May 1 to July 15 each year. TU asserts that claim 43B 194537-00 is subordinate to the claims stemming from the decree issued in *Gerald F. Petrich, et al. v. Archibald and Margaret E. Allen, et al.*, Cause No. 11616 (Mont. Sixth Jud. Dist., Park County, July 22, 1964 (“*Petrich Decree*”). Claimant James R. Melin (“Melin”) opposes this motion.

UNDISPUTED FACTS

1. On April 22, 1982, Robert L. Melin and Wanda M. Melin (“Melins”) filed a statement of claim for a use right from Mill Creek for irrigation use with an April 1,

1912 priority date. (Ex. D, at 123).¹ The statement claimed a period of use from April 1 to August 1 each year. The claim is designated as claim 43B 194537-00.

2. As part of the claim, the Melins filed an “Affidavit Supportinf (*sic*) Filing Under Use Doctrine” executed by Marian A. Melin. The affidavit states the claimants use “*flood water* to properly irrigate the lands during the *flood water* season.” The affidavit goes on to state that Mill Creek “always has *flood waters* each irrigation season and the affiants and their predecessors in interest have used 200 miners inches or more of said *flood waters* since the first appropriation of waters of Mill Creek for affiants’ lands.” (Ex. D, at 128) (emphasis added).

3. James R. Melin is the son of Robert and Wanda Melin, and the successor in interest to claim 43B 194537-00.

4. Mill Creek is an adjudicated stream; the available water in the stream has been the subject of two water rights decrees entered by the Sixth Judicial District Court, Park County.

5. In 1938, the District Court decreed water rights from Mill Creek in the case *Sallie A. Allen, et al. v. N.F. Wampler, et al.*, Cause No. 7583 (Mont. Sixth Jud. Dist., June 1, 1938) (“*Allen v. Wampler Decree*”). (Ex. F).

6. In 1964, the District Court entered a supplemental decree addressing water rights from Mill Creek in the *Petrich Decree*. (Ex. A).

7. The *Petrich Decree* was an action filed by three sets of plaintiffs, including the Melins, pursuant to the now-repealed Sections 89-829 through 89-839, R.C.M (“1921 statutes”). The plaintiffs and counterclaimants sought rights to use high water from Mill Creek in excess of what the District Court previously decreed in the *Allen v. Wampler Decree*.

8. Following a trial in March 1964, the District Court made several findings of fact, including the following:

¹ The exhibit references are to the exhibits TU filed in support of its first summary judgment motions, docketed as Doc. 19.00 in the Court’s Full Court Enterprise system for this case.

That the Court finds that during the months of May and June and until approximately the 15th day of July of the normal irrigating season there is flowing in Mill Creek at the headgate of the Mill Creek Flat Ditch approximately 10,000 miners' inches of water in excess of the total quantity of water heretofore adjudicated and decreed by this Court in the aforesaid action.

(*Petrich Decree*, Finding of Fact, ¶ II).

9. The District Court decreed two water rights to the Melins in the *Petrich Decree* that are now part of the Water Court's adjudication as claims 43B 194542-00 and 43B 194543-00. These two claims also are consolidated in this case. On January 11, 2023, the Water Court granted summary judgment in favor of TU and ordered that the periods of use and diversion for 43B 194542-00 and 43B 194543-00 be modified to May 1 to July 15 in accordance with the high or flood water findings made in the *Petrich Decree*. (Doc. 25.00; *Melin v. Trout Unlimited*, 2023 Mont. Water LEXIS 37).

10. The Water Court included claim 43B 194537-00 in the Temporary Preliminary Decree ("TPD") for the Yellowstone River Basin Above and Including Bridger Creek with different elements than the Preliminary Decree now before the Court. The TPD described the claim as a use right with an April 1, 1912 priority date, and periods of use and diversion of April 1 to August 4.

11. Following the issuance of the TPD, several other Mill Creek water users objected to claim 43B 194537-00. The objections stated:

Mill Creek, the source from which the water right is claimed, is a fully-decreed stream, the last decree having been issued on July 22, 1964, in Cause No. 11616, in the District Court of the Sixth Judicial District Court of the State of Montana, in and for the County of Park. The water right objected to has no basis in any decree of Mill Creek. Further, the claimants of this water right were parties to Cause No. 11616, heretofore referred to, and did not claim this water right in that suit. Therefore, they are estopped from claiming that water right in the present adjudication proceeding.

(Ex. D, at 139).

12. On March 19, 1990, the Melins and objectors Tavner Walker, T.J. Walker, Philip Malcolm, and Gerald Petrich filed a Stipulation (the "Stipulation") agreeing to

modify the priority date of claim 43B 194537-00 to May 1, 1965, and the periods of use and diversion to April 1 to July 15. (Ex. D, at 186).

13. On that same day, the parties filed an Amendment to Stipulation, modifying the periods of use and diversion to April 20 to September 24. In the Amendment, the parties agreed that “this period of use shall not be used adversely against any flood water claims based upon the 1964 Mill creek flood water decree.” (Ex. D, at 189).

14. All objections to claim 43B 194537-00 were withdrawn. The Stipulation and the Amendment to Stipulation were adopted through an Order Adopting Master’s Report, dated June 30, 1994. (Ex. D, at 194).

15. The Water Court included claim 43B 194537-00 in the Preliminary Decree for the Yellowstone River Basin Above and Including Bridger Creek (Basin 43B). The Preliminary Decree describes claim 43B 194537-00 as a use right to use water from Mill Creek with a May 1, 1965 priority date, and a period of use and period of diversion from April 20 to September 20 of each year. These periods of use and diversion that appear on the Preliminary Decree abstract for claim 43B 194537-00 are the same as what were agreed to in the Stipulation, and are the basis of the issues that are the subject of this Order.

ISSUE

Should the Court limit the periods of use and diversion of claim 43B 194537-00, a use right, to May 1 to July 15 of each year in recognition of the decrees for Mill Creek?

DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper when “the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” M. R. Civ. P. 56(c)(3). A material fact involves the elements of the cause of action or defense at issue to such an extent that it requires resolution of the issue by a trier of fact. *Williams v. Plum Creek Timber Co.*, 2011 MT 271, ¶ 14, 362 Mont. 368, 264 P.3d 1090. In determining

whether a material fact exists, the court views the evidence in the light most favorable to the non-moving party. *Lorang v. Fortis Ins. Co.*, 2008 MT 252, ¶ 38, 345 Mont. 12, 192 P.3d 186. “All reasonable inferences that may be drawn from the evidence must be drawn in favor of the party opposing summary judgment.” *Id.*

Where the moving party demonstrates there is no genuine issue as to any material fact, the burden shifts to the party opposing the motion to establish an issue of material fact. *Lee v. USAA Cas. Ins. Co.*, 2001 MT 59, ¶ 26, 304 Mont. 356, 362, 22 P.3d 631, 636. Ultimately the question of whether the moving party is entitled to summary judgment under the undisputed facts is a question of law. *Thornton v. Flathead County*, 2009 MT 367, ¶ 14, 353 Mont. 252, 255, 220 P.3d 395, 399.

B. Analysis

TU contends that as a use right, claim 43B 194537-00 is invalid. Alternatively, TU argues if the claim is not invalid, then it is subordinate to the decreed rights on Mill Creek and its elements should be limited to correlate with *Petrich Decree* and *Allen v. Wampler Decree*. As an objector, TU must prove “that the elements of the claim[s] do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973.” Rule 19, W.R.Adj.R. TU may meet this burden by producing evidence “that overcomes one or more elements of the prima facie statement of claim.” *In re Burkhartsmeier*, 1997 Mont. Water LEXIS 1, *17.

1. Do the 1921 statutes invalidate claim 43B 194537-00?

Prior to their repeal in 1973, the 1921 statutes, §§ 89-829 through 89-839, R.C.M., enumerated the procedures to appropriate water from a decreed stream. *Anaconda Nat'l Bank v. Johnson*, 75 Mont. 401, 411, 244 P. 141, 144 (1926) (“*Anaconda*”). The purpose of these statutes “was to avoid useless water suits, . . . [and] to provide security for those whose water rights already have been adjudicated, to compel those who seek the establishment of a water right in an adjudicated stream to take that water right subject to rights already fixed and determined, after bona fide litigation, by the decree of a competent court.” *Quigley v. McIntosh*, 88 Mont. 103, 108, 290 P. 266, 268 (1930) (“*Quigley I*”). A water right that has been adjudicated is called a “decreed” right. A

decreed right is defined as “a claimed water right determined in a judicial decree prior to the commencement of this adjudication. . . .” Rule 2(a)(18), W.R.Adj.R. A use right is defined as “a claimed existing water right perfected by appropriating and putting water to beneficial use without written notice, filing, or decree.” Rule 2(a)(71), W.R.C.E.R. Claim 43B 194537-00 is a use right.

The 1921 statutes required a person seeking a new appropriation of water from an adjudicated stream to follow a statutory procedure that included filing a petition in district court. Section 89-829, R.C.M. If the district court found surplus water in the stream to warrant the appropriation, the court entered a supplemental decree “subject to the terms of all prior decrees.” Section 89-831, R.C.M. If a person did not petition the court for a supplemental decree, the water user would be subject to a penalty for noncompliance. This statute, Section 89-837, R.C.M. (“penalty provision”), provides:

Failure to comply with the provisions of [the 1921 statutes] deprives the appropriator of the right to use any water of such stream, or other source of supply, as against any subsequent appropriator mentioned or bound by a decree of the court.

In prior master’s reports adopted by the Court, the Water Court interpreted the penalty provision as not acting as an absolute bar to obtaining water rights on an adjudicated stream. For example, in *In re Graveley*, Case 76G-187, 1994 Mont. Water LEXIS 12, *5, the court-adopted master’s report stated:

Therefore failing to comply with 89-829 R.C.M. will assure that the offending appropriator will have a claim which is not only inferior to all of the rights in the original decree but also to all subsequent appropriators who did comply with the act. This is the penalty imposed by 89-837 R.C.M. It does not mean that an appropriator who fails to comply with the act has no water right claim at all.

See also, In re Ashley, Case 43B-60, 1992 Mont. Water LEXIS 29, *3 (accepting stipulation making non-compliant water right junior to all decreed rights on the stream).

TU argues the Water Court’s interpretation of the penalty provision differs from rulings by Montana Supreme Court. In 1922, the Supreme Court suggested that a water right appropriated on an adjudicated stream was only valid if there was “substantial compliance” with the 1921 statutes. *Anaconda*, 75 Mont. at 411, 244 P. at 144. The

Supreme Court affirmed the district court's decision that a non-compliant water right was invalid. *Id.*, at 412, 244 P. at 144. Four years later the Supreme Court affirmed its decision in *Anaconda* and invalidated certain water rights. *Donich v. Johnson*, 77 Mont. 229, 246, 250 P. 963, 968 (1926). The Court made a similar determination about water rights appropriated in noncompliance with the 1921 statutes in *Quigley v. McIntosh*, 88 Mont. 103, 290 P. 266 (1930) (*Quigley II*) which contrasted its previous opinions outlined in *Quigley I*.

The parties spend considerable effort in their briefing debating these cases, and arguing about what might or might not be dicta. The Court finds the debate to be largely academic. The Montana legislature repealed the 1921 statutes when it adopted the Montana Water Use Act in 1973. The Montana Supreme Court has not addressed the issue of whether non-compliance with the 1921 statutes' procedural provisions bars the Water Court from recognizing a use right on a pre-1973 decreed stream. Moreover, prior to its repeal, no one tried to use the 1921 statutes to invalidate the Melins' use of non-decree water on Mill Creek. Significantly, Melin does not dispute the penalty provisions of the 1921 statute apply, meaning claim 43B 194537-00 should have a priority date subordinate to all pre-July 1, 1973 Mill Creek decreed rights appropriated in compliance with the 1921 statutes. Under the undisputed facts of this case, the Court concludes the noncompliance with the 1921 statutes provide evidence as to the proper priority date for the claim, but not evidence to invalidate it.

2. *Does TU's motion prove the period of diversion and period of use elements should be limited to May 1 to July 15?*

TU asserts the Court should limit the periods of use and diversion of claim 43B 194537-00 to May 1 to July 15 in accordance with the elements of the *Petrich Decree*, the penalty provision of the 1921 statutes, and statements made in the affidavit supporting the original statement of claim. Melin contends the Court already addressed this issue by accepting the Stipulation. Melin also disputes TU's interpretation of the supporting affidavit.

The Court does not accept TU's argument that the penalty provision of the 1921 statutes operate to limit the period of use. By stripping rights as against a "subsequent appropriator," the penalty provision was written in terms of effective priority date, not period of use. Section 89-837, R.C.M (*repealed*). As applied to Mill Creek, there is no evidence of compliant decreed junior users outside of those identified in the two district court decrees, so the facts presented by the parties offer no basis on which to apply the penalty provision as it was drafted by the legislature.

TU's argument as to the period of use the Melins actually claimed carries more weight. As TU notes, the affidavit the Melins submitted in support of claim 43B 194537-00 describes the claim four different times as a "flood water" right. The Melins filed the affidavit as evidence supporting the claim, as required by § 85-2-224(2), MCA. In the *Petrich Decree*, the District Court decreed Mill Creek flood water rights. In its summary judgment order in this case, the Water Court interpreted the District Court's ruling on flood water as limited to the period between May 1 to July 15. By repeatedly using the term "flood water" in the affidavit, the Melins constrained their period of use to the flood water period on Mill Creek, which the District Court defined as May 1 to July 15.

Notwithstanding their own supporting affidavit, and the Melins' participation in the *Petrich Decree* litigation, Melin argues the Water Court "adjudicated" claim 43B 194537-00 by accepting the Stipulation. This assertion is incorrect. The Stipulation is not binding on the Water Court, especially to the extent it purports to expand elements of a claim. The Stipulation also is not binding on TU because TU was not an objector in the TPD process, nor did it waive the right to object because the TPD was issued prior to March 28, 1997. Section 85-2-233(1)(c), MCA. TU put the period of use at issue through its objection. To the extent the objection is valid, it supersedes any private agreements between prior objectors as to the period of use.

ORDER

Therefore, it is ORDERED that TU's motion for summary judgment is GRANTED IN PART. TU's motion establishes that it has overcome the prima facie

status of the period of use for claim 43B 194537-00 by showing the claimed period of use exceeds the flood water description contained in the statement of claim. Melin now has the burden of proof to show at a hearing that the period of use is not limited to May 1 to July 15 each year. Additional proceedings are necessary before this case may be closed; the dates and deadlines set in the March 22, 2023 Order Amending Scheduling Order (Doc. 27.00) remain.

ELECTRONICALLY SIGNED AND DATED BELOW.

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